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Your Employee Benefit Plans May Need a Check Up: Nearing the End of the COVID-19 Public Health Emergency

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Where did the time go? Just a brief 1,199 days after it began, the COVID-19 Public Health Emergency (PHE) is coming to an end. The PHE formally ends on May 11, 2023, short of any unexpected developments. And that means the time is now (or 4:50 p.m. on May 10, based on historical trends) for benefit plan sponsors to think about the necessary changes to their plans to mark the occasion. From the employers' perspective, there are some key changes to take note of as the sun begins to set on COVID-19 emergency measures which may have impacted employee benefit plans over the past few years.

The COVID-19 National Emergency Has Already Ended. The COVID-19 National Emergency that went into effect March 1, 2020 already ended April 10, 2023, a month earlier than the original plan. Plan sponsors and administrators are no longer required to provide extensions of certain deadlines under COBRA, HIPAA, and ERISA for events which arise after the date the federal government declared the end of the National Emergency. While in place, the National Emergency served to toll deadlines for benefit plans, primarily through requiring plan sponsors and administrators to toll those deadlines by not starting the timers until the sooner of (1) one year from the events triggering the deadlines or (2) sixty days from the end of the National Emergency

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(referred to as the "outbreak period"). While plan sponsors and administrators are no longer required to provide those extensions for events occurring moving forward, they are still applicable to events that happened before the end of the National Emergency.

Standalone Telehealth. Despite the coverage mandates under the Affordable Care Act, certain employees remained ineligible to participate in their employers' health plans for various reasons (e.g., being part-time). But as part of the PHE, employers were able to offer standalone telehealth programs for those employees. This may no longer be the case upon the end of the PHE.

COVID Cost-Sharing. One of the big changes associated with the PHE was the requirement that *all* employer health plans pay for COVID testing and vaccines (including by out-of-network providers) without any required payments by participants. While plans certainly may continue to offer this type of enhanced coverage, the end of the PHE takes away the requirement to do so. That said, non-grandfathered plans must still offer full coverage for COVID vaccines as preventative care services under the Affordable Care Act.

Taking the Deductible out of High-Deductible Health Plan. The general requirement for high-deductible health plans is that those plans not pay for coverage until the participants meet their deductibles. Failing to do so can result in the plan losing its tax-favored status. IRS Notice 2020-15, however, permitted (but did not require) these types of plans to offer employer first-dollar coverage for COVID testing and treatment even where participants had not met their deductibles. While this change *technically* will remain in-place following the end of the PHE, the U.S. Department of Labor, Employee Benefits Security Administration, has indicated that employers should expect guidance on the matter "in the near future." As that guidance might remove this ability, employers should either

remove those provisions now or set reminders and news alerts so they don't miss any important updates that would require amendments to their high-deductible health plans.

The Amazing Transforming EAPs. If a benefit plan qualifies as a health plan, it is usually subject to more regulations than non-health plans (e.g., disability plans) under laws such as the Affordable Care Act, HIPAA, etc. As a result, employers generally do not want their non-health plans to be treated as health plans. The easiest option to avoid that outcome is simply not to offer significant healthcare-related benefits under these other types of plans, but the PHE added a wrinkle for employee assistance programs. During the PHE, employee assistance programs were allowed (but not required) to offer COVID testing and preventative care without being deemed medical plans. Now, however, employers that do not want to risk having to do things like send COBRA notices for their employee assistance programs will want to take the COVID-related provisions out of those plans.

Retirement Plans. With the PHE came suspension (practically speaking) of required blackout notices; relaxed rules for distributions and loans from employee retirement accounts; permissible COVID-related distributions; and remote notarizations. As to **blackout notices**, we hope your participant-directed retirement plans continued supplying blackout notices (for periods during which their ability to direct investments, obtain loans, or receive distributions were limited). Having said that, the regulatory interpretation during the PHE has been that COVID was an event beyond the reasonable control of retirement plans, and thus the requirement to provide blackout notices was suspended. Just make sure you're providing these notices going forward if you haven't already been doing so. As to **COVID-related distributions and loans**, we can no longer expect the government to look the other way. If you have participants who have taken loans and have not been reliably repaying

them since, you'll want to restore the loan limits of your plans and the repayment processes for them, and be sure you comply with them! Also make sure you remove any language in your plan documents regarding COVID-related distributions and don't permit them going forward. Finally, as to certain documents requiring **notarization** (such as spousal consents), the IRS temporary relief obviating the physical presence requirement expired December 31, 2022. While the IRS may be considering a permanent change embracing remote notarization, we're not there yet, so your plan should *currently* require physical presence for signatures, but definitely stay tuned for developments.

Employer Takeaways. The early days of the COVID-19 pandemic may be a distant memory, but it is essential that employers check up on their plans to see if any COVID-related provisions that were placed into various benefit plans, including through the actions of insurers or other vendors, may now need to be removed. The safest option is to review your plans and vendor agreements for PHE- and other COVID-related language, and determine on a case-by-case basis whether any changes are necessary or otherwise desired. Just remember if you're changing or removing benefits or language, you might have to submit a notice of reduced benefits, summary of material modifications, or updated summary of benefits and coverage. And certainly you'll want to notify participants regarding the end of the outbreak-period extensions for internal claims in welfare and retirement plans. Congress and the various regulatory agencies establish the rules under which plans must operate, but only you are in a position to ensure they comply. Employers should work with their Akerman Labor & Employment Law and Employee Benefits attorneys to ensure their policies and practices are up to date.

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recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.